Supreme Court, U.S.
FILED
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No. _____

In The
Supreme Court of the United States

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STATE OF FLORIDA,
*Petitioner,*

*v.*

MARK K. SACHS,
*Respondent.*

---

**On Petition For a Writ of Certiorari to the Florida Supreme Court**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This case presents the same questions presented in the pending case of State of Florida v. Gabriel Harden, et al., No. 06-770. The questions are:

1. Whether persons who receive remuneration for providing services or referrals for which payment is not made under Medicaid fall within the federal employee safe harbor provision.

2. Whether the anti-kickback provision of Florida's Medicaid fraud statute is preempted by the federal anti-kickback statute.

## LIST OF PARTIES

The petitioner is the State of Florida.

Respondent is Mark K. Sachs.

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No. _____

# In The
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STATE OF FLORIDA,
*Petitioner*,

*v.*

MARK K. SACHS,
*Respondent*.

---

**On Petition For a Writ of Certiorari to the Florida Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

Petitioner State of Florida hereby petitions for a writ of certiorari to review the decision of the Florida Supreme Court in this case.

## OPINIONS BELOW

The decision of the Florida Supreme Court, dated January 18, 2007, and reported at 948 So. 2d 723 (Fla. 2007), is set forth in Appendix A, pp. 1a-2a. The decision of the District Court of Appeal of Florida, Third District, reported at 926 So. 2d 440 (Fla. Dist. Ct. App. 2006), is set forth in Appendix B, p. 3a. The order of the Eleventh Judicial Circuit Court is set forth in Appendix C, pp. 4a-5a.

## JURISDICTIONAL STATEMENT

The decision of the Florida Supreme Court was entered on January 18, 2007. The time in which a motion for rehearing or clarification may be filed elapsed on February 2, 2007, during which time no motion was filed. See Fla. R. App. P. 9.330(a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes, constitutional provisions, and federal regulations, the pertinent portions of which are set forth in Appendices F-1:

**1.** Article VI, clause 2 of the United States Constitution. App. 22a.

**2.** 42 U.S.C. § 1320a-7b. App. 23a-24a.

**3.** § 409.920, Fla. Stat. (2000). App. 25a-26a.

**4.** 42 C.F.R. § 1001.952. App. 27a.

## STATEMENT OF THE CASE

This petition presents the same issue presented in the pending case of State of Florida v. Gabriel Harden, et al., No. 06-770: whether the anti-kickback provision of Florida's Medicaid fraud statute is preempted by the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(2). The federal statute makes it unlawful to "knowingly and willfully" pay or receive remuneration for furnishing an item or service for which payment may be made under the Medicaid program.

Under the Florida anti-kickback statute in effect in 2000,

it was unlawful to "knowingly solicit, offer, pay or receive any remuneration, including any kickback . . . directly or indirectly . . . in cash or in kind, in return for referring an individual to a person for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program. . . ." § 409.920(2)(e), Fla. Stat. (2000) (emphasis added). The term "knowingly" meant "done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." § 409.920(1)(d), Fla. Stat. (2000).

The issue presented in Harden and here is whether the Florida law is preempted because the federal law has a different mens rea standard. Harden also presents the question whether persons who receive remuneration for providing services for which payment is not made under Medicaid, i.e., providing patient referrals, fall within the federal employee safe harbor provision, 42 U.S.C. § 1320a-7b(b)(3)(B). That issue is presented here as a precaution, although, for the reasons explained, infra, it does not appear that the defendant, Mark K. Sachs, has claimed or could claim the employee safe harbor provision as a defense.

Should this Court reverse the decision of the Florida Supreme Court in Harden, it should also vacate that court's decision in this case and remand for further proceedings.

### A. Proceedings Below

In August 2000, the State of Florida, through the Office of the Statewide Prosecutor, filed a three-count information charging Mark K. Sachs with racketeering, conspiracy to commit racketeering, and violations of the Florida Medicaid Fraud anti-kickback statute, § 409.920(2)(e), Fla. Stat.(2000). The predicate activity was violation of the Medicaid fraud statute. App. 6a-18a. The State alleged that between May 1 and November 6, 1997, the defendant, a Medicaid provider physician, was paid a total of $110,000.00 for prescriptions he referred to be filled by

other conspirators, which prescriptions were ultimately paid for by the Medicaid program. Id.

On May 6, 2004, the trial court granted the defendant's motion to dismiss. App. 4a-5a, 19a-20a. Its order was based solely upon the decision of the Third District Court of Appeal in State v. Harden, 873 So. 2d 352 (Fla. Dist. Ct. App. 2004), which held Florida's Medicaid anti-kickback statute, § 409.920(2)(e), Fla. Stat.(2000), unconstitutional. App. 4a-5a. On appeal, the Third District affirmed the trial court's dismissal, based on the parties' stipulation at the trial level as to the controlling effect of State v. Harden. App. 3a.

The Third District's decision in Harden had found § 409.920(2)(e), Fla. Stat. (2000), to be facially unconstitutional as preempted by the federal Medicaid anti-kickback provision, which contained "safe harbor" provisions and a "willful" mens rea requirement, neither of which appeared in the 2000 Florida Medicaid fraud statute.[1] Harden, 873 So. 2d at 355. The Florida Supreme Court affirmed the Third District's Harden decision, agreeing that Florida's anti-kickback statute was preempted by federal Medicaid law. State v. Harden, 938 So. 2d 480 (Fla. 2006). The State's petition for a writ of certiorari in Harden is still pending as of the filing of this petition.

Subsequently, in its review of the Third District's decision in Sachs, the Florida Supreme Court issued an order directing the State to show cause why the court should not summarily affirm Sachs in light of the decision in Harden. App. 1a. Although the State did not agree that Harden was correctly decided, it did agree that the decision was controlling and summary affirmance appropriate. Id. Thus, on the basis of its decision in Harden and the State's response to the order to show

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[1]Florida amended § 409.920(1)(d) in 2004 to add the word "willfully" and define the term "knowingly and willfully." That amendment, however, did not add an employee safe harbor.

cause, the Florida Supreme Court affirmed the Third District's affirmance of the trial court's order of dismissal. App. 1a-2a.

**B. Statutory and Regulatory Background**

Congress has required participating states to have a Medicaid fraud and abuse control unit as an element of a federally-approved Medicaid plan. See 42 U.S.C. § 1396a(61). The function expressly prescribed for such a unit is "the investigation and prosecution of violations of all applicable State laws regarding any and all aspects of fraud in connection with (A) any aspect of the provision of medical assistance and the activities of providers of such assistance under the State plan under this subchapter . . . ." 42 U.S.C. §§ 1396a(61), 1396b(q)(3) (emphasis added).

When Congress first enacted the federal Medicaid anti-kickback statute, the attendant committee report indicated that these provisions "would be in addition to and not in lieu of any other penalty provisions in state or federal law." H.R. Rep. No. 92-231, (1972), as reprinted in 1972 U.S.C.C.A.N. 5093, 5094 (emphasis added). Congress has repeatedly stated that the anti-kickback provisions were intended to address practices long considered unethical, that were unlawful in some jurisdictions, and that contributed appreciably to the cost of the Medicare and Medicaid programs. Id.; H.R. Rep. No. 95-393 (1977), as reprinted in 1977 U.S.C.C.A.N. 3039, 3052. Legislative history indicates that when the "knowingly and willfully" mens rea element was added to the statute, Congress intended to shield from criminal prosecution those individuals "whose conduct, while improper, was inadvertent." H.R. Rep. No. 96-1167, at 59 (1980), as reprinted in 1980 U.S.C.C.A.N. 5526, 5572.

In 1977 Congress included a safe harbor for payments made to employees in a bona fide employment relationship "for employment in the provision of covered items or services." See Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 95-142, § 4(b)(1), 91 Stat. 1175, 1180-81 (1977). In 1987

Congress required HHS to issue regulations establishing specific financial arrangements--"safe harbors"--that would not violate the anti-kickback statute. See Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, §§ 4, 14, 101 Stat. 680, 688-89, 697-98 (1987). The employee safe harbor regulation, 42 C.F.R. § 1001.952(i), tracks the statutory safe harbor language but clarifies that the item or service furnished must be one "for which payment may be made in whole or in part under . . . Medicaid."

HHS made clear that its proposed safe harbor regulations "would not provide immunity from civil or criminal prosecution or other sanctions under any other Federal or State laws. For example, a particular arrangement under a safe harbor . . . may run afoul of a State law that is applied by the State in a stricter fashion than the federal law." Medicare & Medicaid Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Proposed Rule, 54 Fed. Reg. 3088, 3089 (Jan. 23, 1989); see also Federal Health Care Programs: Fraud and Abuse; Statutory Exception to the Anti-Kickback Statute for Shared Risk Arrangements, 64 Fed. Reg. 63504, 63506 (Nov. 19, 1999) ("Safe harbors do not apply to other laws, such as . . . State health care fraud laws."). When promulgating the final safe harbor regulations, 42 C.F.R. § 1001.952, the Office of Inspector General of HHS again stated that "conduct that is lawful under the federal anti-kickback statute or this regulation may still be illegal under State law." Medicare & State Health Care Programs: Fraud and Abuse, OIG Anti-Kickback Provisions, Final Rule, 56 Fed. Reg. 35952, 35957 (July 29, 1991).

## REASONS FOR GRANTING THE WRIT

The allegations of the information filed in the trial court, App. 6a-18a, reflect serious violations of Florida's Medicaid fraud anti-kickback statute. Because this case was decided solely on the basis of the Florida Supreme Court's decision in Harden

without any elaboration of facts or defenses, it must be presumed that the lower courts addressed one or both of the questions presented in the pending Harden case.

The State of Florida asks the Court to hold this petition until such time as a ruling is made in State of Florida v. Harden, No. 06-770. Assuming the Florida Supreme Court's decision in Harden is reversed in whole or in part, the State of Florida asks that the decision of the Florida Supreme Court be vacated and this case remanded for further consideration in light of this Court's ruling.

The decision below and the Harden decision are wrong and certiorari should be granted for the following reasons.

**1. The Federal Safe Harbor Statute and Regulations Apply Only Where An Employee Provides A Covered Service.**

By their plain terms the federal safe harbor statute and the implementing HHS regulation shelter only those payments made to employees in the provision of "covered" items or services for which payment may be made in whole or in part under Medicaid. See 42 U.S.C. § 1320a-7b(b)(3)(B); 42 C.F.R. § 1001.952(i).

From the facts set forth in the information filed below, App. 6a-18a, it would not appear that respondent Sachs, a Medicaid provider physician, was employed or could have been employed by the pharmacy from which he accepted kickbacks, nor that he was providing any Medicaid-compensable service to the pharmacy. The only apparent "service" he provided in return for the remuneration was the referral of prescriptions.

The decision of the Florida Supreme Court in Harden wrongly decided that Florida's anti-kickback statute was preempted, and that a defendant was protected by the federal safe harbor regardless of whether he was providing a Medicaid-compensable service. Because it is not clear whether respondent Sachs was i) claiming protection under the federal employee safe

harbor, and ii) providing a Medicaid-compensable service in return for the remuneration, the decision below should be vacated and this case remanded.

**2. The Florida Anti-Kickback Statute Should Not Have Been Held Preempted Because Of Different Mens Rea Language.**

In its decision in Harden, the Florida Supreme Court held that § 409.920(2)(e) was preempted because the "should be aware" language in § 409.920(1)(d), Fla. Stat.(2000), permitted prosecution based on negligent conduct. Like the defendant in Harden, however, Sachs was not charged with negligent or inadvertent conduct. It would defy common sense to conclude that one could negligently receive $25,000 in cash, three $25,000 checks, and a $10,000 check in return for referring patients to the service provider paying the kickbacks. App. 8a-12a.

Congress' use of the word "willfully" in 42 U.S.C. § 1320a-7b(b)(2) was intended to shield only inadvertent conduct. App. 16a, 17a, 19a. See H.R. Rep. No. 96-1167, at 59 (1980), as reprinted in 1980 U.S.C.C.A.N. 5526, 5572. Congress could not have intended to protect kickback schemes involving the repeated payment and acceptance of fees for patient referrals, as in Harden, or, as here, for prescription referrals.

The decision below is wrong for the same reasons the Harden decision was wrong. First, Congress expressly authorized the states to enforce their own laws on fraud. See 42 U.S.C. § 1396b(q)(3). In preemption cases, this Court has interpreted explicit statutory provisions recognizing state authority "to mean what they say." Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 34 (1996). Therefore, even if there is a difference in the mens rea standard of the federal and state laws, it is irrelevant. Second, in this case, as in Harden, Florida is not prosecuting negligent or inadvertent conduct. The Florida Supreme Court erred in holding that the Supremacy Clause required the Florida anti-kickback statute to be preempted in its

entirety when only the "should be aware" language was problematic. It is well-established that in preemption cases a court "should not extend its invalidation of a statute further than necessary to dispose of the case before it." Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996)(quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985)).

Third, even if § 1396b(q)(3) were disregarded, the "should be aware" language in Florida's definition of the term "knowingly" does not stand as an obstacle to the full purposes and objectives of Congress. Both criminalize the same intentional act--making referral payments. In these circumstances, where the payment and acceptance of kickbacks reflect intentional and even planned conduct, the difference between the federal and Florida mens rea standard is inconsequential. All Medicaid providers--be they physicians or pharmacists--should know that paying for patient or prescription referrals is unlawful. Here, Florida has not sought to prosecute negligent conduct, but conduct that every physician and pharmacist should know to be improper. Hence, the Florida mens rea standard cannot be held to frustrate Congress' purpose--combating Medicaid and Medicare fraud.

### 3. The Issues Presented In This Case Are Of Vital Importance To All State Medicaid Programs.

Congress gave the states a clear command--to prosecute "violations of all applicable State laws regarding any and all aspects of fraud" in connection with their Medicaid programs. 42 U.S.C. § 1396b(q)(3)(emphasis added). Fraud is endemic to the Medicaid program and it is vital that the states know how far their powers extend in this area. Congress has repeatedly characterized kickbacks as unethical and found they increase the costs of the Medicaid and Medicare programs. See Statement of the Case, supra, p. 5.

Applying the reasoning of the Harden decision, any state anti-kickback statute whose mens rea language is not identical to

the federal standard of "knowingly and willfully" would be facially preempted even when--as here--the state is not prosecuting negligent or inadvertent conduct. In addition, those state statutes lacking an employee safe harbor would also be preempted.

Whether the laws of a majority of states could be found preempted under the reasoning of Harden and the decision below is an important question that should be resolved now. Only three states use the federal mens rea term "knowingly and willfully," nine use only the word "knowingly," and nineteen states and the District of Columbia have no mens rea language at all. Others use such terms as "purposely," "intentionally," "knowingly or intentionally," and "intentionally or with reckless disregard." App. 27a-35a. Further, sixteen states and the District of Columbia have no statutory safe harbor provision like 42 U.S.C. § 1320a-7b(b)(3)(B). Id. Nineteen states do have such a provision. Id.

The states must know whether and to what extent their Medicaid fraud laws have been preempted. Only this Court can definitively decide this issue. State by state adjudication will only be wasteful and inconclusive.

## CONCLUSION

For all the reasons set forth, the decision below should be vacated and this case remanded for further proceedings consistent with this Court's decision in State v. Harden, No. 06-770.

Respectfully submitted,

**BILL McCOLLUM**
*Attorney General of Florida*

**SCOTT MAKAR**
*Solicitor General*

**LOUIS F. HUBENER**
*Chief Deputy Solicitor General*
*Counsel of Record*

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**APPENDIX A**

# Supreme Court of Florida

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No. SC06-769

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**STATE OF FLORIDA,**

Appellant,

vs.

**MARK K. SACHS,**

Appellee.

**[January 18, 2007]**

PER CURIAM.

We have for review *State v. Sachs, 926 So. 2d 440 (Fla. 3d DCA 2006)*, in which the Third District Court of Appeal affirmed the trial court's ruling based upon the parties' stipulation at the trial level as to the controlling effect of *State v. Harden, 873 So. 2d 352 (Fla. 3d DCA 2004)*, aff'd, *938 So. 2d 480 (Fla. 2006)*. At the time the Third District Court issued its decision in Sachs, Harden was pending review in this Court. We have jurisdiction. See *art. V, § 3(b)(1), (3), Fla. Const.*; *Jollie v. State, 405 So. 2d 418 (Fla. 1981)*.

We recently affirmed the Third District Court's decision in Harden. See *State v. Harden, 938 So. 2d 480 (Fla. 2006)*. As a result, we issued an order on September 20, 2006, directing the appellant to show cause why this Court should not summarily affirm Sachs in light of our decision in Harden. Appellant agreed

that "Harden is controlling in the instant case, and summary affirmance is appropriate." Therefore, based upon our decision in *Harden* and the appellant's response to the order to show cause, we summarily affirm the decision of the Third District Court in Sachs.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

An Appeal from the District Court of Appeal - Statutory or Constitutional Invalidity

Third District - Case No. 3D04-1244 (Dade County).

Bill McCollum, Attorney General, Tallahassee, Florida, and Jennifer Falcone Moore, Assistant Attorney General, Miami, Florida,

for Appellant.

Milton Hirsch of Milton Hirsch, PLLC, Miami, Florida,

for Appellee.

**APPENDIX B**

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT**

STATE OF FLORIDA,

Appellant,

v.

MARK K. SACHS,

Appellee.

CASE NO. 3D04-1244

LOWER TRIBUNAL NO. 02-32726.

Opinion Filed April 12, 2006.

DECISION WITHOUT PUBLISHED OPINION

An Appeal from the Circuit Court for Miami-Dade County, Mary Barzee, Judge.

Charles J. Crist, Jr., Attorney General, and Jennifer Falcone Moore, Assistant Attorney General, for appellant.

Roberto D. Stanziale, for appellee.

Before GERSTEN, RAMIREZ, and SHEPHERD, JJ.

PER CURIAM.

Based on the parties' stipulation at the trial level as to the controlling effect of *State v. Harden, 873 So. 2d 352 (Fla. 3d DCA 2004)* (finding *section 409.920(2)(e), Florida Statutes*, unconstitutional), appeal pending, No. SC04-613, we hereby affirm.

## APPENDIX C

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR**

**MIAMI-DADE COUNTY, FLORIDA**

**CRIMINAL DIVISION**

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. F02-32726

MARK KENNETH SACHS,

Defendant.

---

## ORDER OF DISMISSAL

THIS CAUSE having come before this Court upon Defendant's Motion to Dismiss; and the Court having heard argument and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED that Defendant's Motion to Dismiss is GRANTED and the within cause is dismissed with prejudice, for the following reasons:

1. The State and Defense have stipulated that the decision in *State v. Harden* is controlling.

2. Based solely upon the holding in *State v. Harden*, finding Florida Statute 409.920(2)(e) unconstitutional, this case is hereby dismissed with prejudice.

DONE AND ORDERED in Miami-Dade County, Florida, on this 6th day of May, 2004.

_____

THE HON. MARY BARZEE

Copies furnished to:

Milton Hirsch

Teresa Williams

**APPENDIX D**

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

vs.

MARK KENNETH SACHS, (A)

Defendant.

_____/

CASE NO. F02-32726

OSWP CASE NO.: 2002-0291-SFB

**INFORMATION FOR:**

**COUNT 1:**

**Racketeering**

**F.S. 895.03 (F1)**

**COUNT 2:**

**Conspiracy to Commit Racketeering**

**F.S. 895.03(4) (F1)**

**COUNT 3:**

**Medicaid Provider Fraud**

**F.S. 409.920(2)(e) (F3)**

IN THE NAME AND BY THE AUTHORITY OF THE

STATE OF FLORIDA

**COUNT 1:**

**Racketeering**

MELANIE ANNE HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that beginning on or about May 1, 1997 and continuing through and including on or about November 6, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including the Second and Eleventh Judicial Circuits, the defendant **MARK KENNETH SACHS**, and others known and unknown to the prosecution were employed by and did associate with an enterprise as defined by Section 895.02(3), Florida Statutes, to-wit: IV Solutions, Inc. and a group of individuals associated in fact, though not a legal entity, to wit: Mark Kenneth Sachs, Elizabeth Pascual and Isabel Calderon. The object of the enterprise was to engage in racketeering activity within the meaning of Section 895.02(1), Florida Statutes, by committing crimes chargeable by indictment or information under Chapter 490, Florida Statutes, relating to Medicaid Provider Fraud. The aforementioned defendant and others known and unknown to the prosecution did unlawfully, willfully and knowingly conduct or participate, directly or indirectly, in such enterprise, through a pattern of racketeering activity as defined by Sections 895.02(1)(a)4, Florida Statutes, by engaging in at least two incidents of racketeering activity which had similar intents, results, accomplices, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics and were not isolated incidents in violation of Section 895.03, Florida Statutes, including, but not limited to the following:

## PREDICATE A: MEDICAID PROVIDER FRAUD

On or about May 1, 1997, and continuing through and including May 31, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) in U.S. Currency for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

## PREDICATE B: MEDICAID PROVIDER FRAUD

On or about May 1, 1997, and continuing through and including September 3, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal

conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1117, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

**PREDICATE C: MEDICAID PROVIDER FRAUD**

On or about June 3, 1997, and continuing through and including September 8, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback,

bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1232, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

**PREDICATE D: MEDICAID PROVIDER FRAUD**

On or about August 25, 1997, and continuing through and including October 2, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing,

leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1334, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

**PREDICATE E: MEDICAID PROVIDER FRAUD**

On or about November 6, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of ten thousand dollars ($10,000.00) via check number 1440, Capital Bank account number 10501008421, for

prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

**COUNT 2:**

**Conspiracy to Commit Racketeering**

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about the May 1, 1997, and continuing through and including on or about the November 6, 1997, as apart of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including the Second and Eleventh Judicial Circuits of Florida, to-wit: Leon and Miami-Dade Counties, Florida, the defendant, **MARK KENNETH SACHS**, did unlawfully and knowingly combine, conspire, confederate and agree, each with the other and together with others, to wit: Elizabeth Pascual and Isabel Calderon, to violate the laws of the State of Florida, to-wit: the laws which prohibit any persons employed by or associated with any enterprise as defined in Florida Statute 895.02(3), and the defendant, **MARK KENNETH SACHS**, was employed by or associated with an enterprise, from conducting or participating, either directly or indirectly, in the affairs of said enterprise through a continuous pattern of racketeering activity, in violation of Florida Statute 895.03(3), and through said enterprise did either engage in at least two incidents of racketeering activity or otherwise participated in the affairs of said enterprise with the knowledge and intent that other members of the conspiracy would engage in at least two incidents of racketeering activity as defined by Section 895.02(4), Florida Statute, which had similar intents, results, accomplices, victims or methods of commission or were otherwise related by distinguishing charactaristics and were not isolated incidents and

included crimes chargeable under Chapter 490.920-Medicaid Fraud, all in violation of 895.03(4), Florida Statutes, and said offenses occurred in two or more judicial circuits in the State of Florida as part of a related transaction, all in violation of 895.03(4), Florida Statutes, including, but not limited to the following:

**PREDICATE A: MEDICAID PROVIDER FRAUD**

On or about May 1, 1997, and continuing through and including May 31, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) in U.S. Currency for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

**PREDICATE B: MEDICAID PROVIDER FRAUD**

On or about May 1, 1997, and continuing through and including September 3, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1117, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

**PREDICATE C: MEDICAID PROVIDER FRAUD**

On or about June 3, 1997, and continuing through and including September 8, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal

conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1232, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

**PREDICATE D: MEDICAID PROVIDER FRAUD**

On or about August 25, 1997, and continuing through and including October 2, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the

furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1334, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

**PREDICATE E: MEDICAID PROVIDER FRAUD**

On or about November 6, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc.,

did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of ten thousand dollars ($10,000.00) via check number 1440, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

**COUNT 3:**

**Medicaid Provider Fraud**

MELANIE ANNE HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about November 6, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits the defendant **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as a part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid Program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of ten thousand dollars ($10,000.00) via check number 1440, Capital Bank account number 10501008421, for prescriptions he referred to IV

Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

ALL OF SAID OFFENSES BEING AGAINST THE PEACE AND DIGNITY OF THE STATE OF FLORIDA.

Dated this 6th day of November, 2002.

**MELANIE ANNE HINES**
STATEWIDE PROSECUTOR
STATE OF FLORIDA

---

**HUGO ACEBO**
Assistant Statewide Prosecutor
Florida Bar NO. 999296
Office of Statewide Prosecution
110 SE 6th Street, Suite 1400
Fort Lauderdale, FL 33301
(954) 712-4950

***

**APPENDIX E**

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. F02-32726

MARK KENNETH SACHS,

Defendant.

---

**DEFENDANT'S MOTION TO DISMISS**

Defendant Mark Kenneth Sachs, by and through undersigned counsel, makes this, his Motion to Dismiss, and would show:

On February 6, 2003, The Hon. David Miller of this Circuit entered his Order in *State of Florida v. Gabriel Harden*, Case No. F00-38785, granting the defendant's motion and dismissing the case on grounds of the facial unconstitutionality of the statute under which Harden was, and Dr. Sachs is, charged. See Exhibit A attached hereto.

On January 28, 2004, the Third District Court of Appeal affirmed the lower court's ruling concluding that "the trial court properly found that there was implied conflict preemption and declared section 409.920, Florida Statutes (2000), unconstitutional". See Exhibit B attached hereto.

WHEREFORE Defendant Mark Kenneth Sachs respectfully requests this Honorable Court to enter its Order granting the relief sought herein and dismissing the within cause; and granting such other relief as to this Honorable Court shall seem just.

Respectfully submitted,

HIRSCH & MARKUS, LLP

---

Milton Hirsch

Fla. Bar No. 350850

Two Datran Center, Suite 1200

9130 South Dadeland Bouelvard

Miami, Florida 33156

Tel: 305-670-0077

Fax: 305-670-7003

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by facsimile and/or U.S. mail this 3 day of February, 2004, to: Teresa Williams, Office of the Statewide Prosecutor, The 110 Tower, Suite 1400, 110 SE 6th Street, Ft. Lauderdale, FL 33301.

_____

MILTON HIRSCH

## APPENDIX F

Article VI, clause 2 of the United States Constitution, provides the following:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

## APPENDIX G

42 U.S.C. § 1320a-7b provides, in part, the following:

* * *

**(b) Illegal remunerations**

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in case or in kind–

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person–

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to –

* * *

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services;

* * *

## APPENDIX H

§ 409.920, Fla. Stat. (2000), provided in pertinent part:

**409.920 Medicaid provider fraud.–**

(1) For purposes of this section the term:

* * *

(c) "Item or service" includes:

1. Any particular item, device, medical supply or service claimed to have been provided to a recipient and listed in an itemized claim for payment; or

2. In the case of a claim based on costs, any entry in the cost report, books of account, or other documents supporting such claim.

(d) "Knowingly" means done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result.

(2) It is unlawful to:

(e) Knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate indirectly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service for which payment may be made, in whole or in part, under the Medicaid program.

A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

## APPENDIX I

42 C.F.R. § 1001.952 provides in pertinent part:

**§ 1001.952 Exceptions**

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

* * *

(i) Employees. As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

## APPENDIX J

## STATE MEDICAID FRAUD STATUTES

| STATE | KICKBACK STATUTE | MENS REA LANGUAGE | EMPLOYEE SAFE HARBOR |
|---|---|---|---|
| | | | |
| AL | Code of Ala. § 22-1-11 (2006) | None | Yes |
| AK | No statute found | N/A | N/A |
| AZ | A.R.S. §13-3713 (2006) | Knowingly | No |
| AR | A.C.A. § 5-55-111 (2006) and<br>A.C.A. § 20-77-902 (2006) | Purposely<br>Knowingly | Yes<br>Yes |
| CA | Cal Wel & Inst Code § 14107.2 (2006) | None | Yes |



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| STATE | KICKBACK STATUTE | MENS REA LANGUAGE | EMPLOYEE SAFE HARBOR |
|---|---|---|---|
| CO | C.R.S. 26-4-1103 (2006) | Intentionally or with Reckless Disregard | Yes |
| CT | Conn. Gen. Stat. § 53a-161c (2006) | Knowingly | Yes |
| DE | 31 Del. C. § 1005 (2006) | None | Yes |
| DC | D.C. Code § 4-802 (2006) | None | No |
| FL | Fla. Stat. § 409.920 (2000) | Knowingly | No |
| GA | No statute found | N/A | N/A |
| HI | No statute found | N/A | N/A |
| ID | No statute found | N/A | N/A |
| IL | 305 ILCS 5/8A-3 (2006) | None | Yes |

| STATE | KICKBACK STATUTE | MENS REA LANGUAGE | EMPLOYEE SAFE HARBOR |
|---|---|---|---|
| IN | Burns Ind. Code Ann. § 12-17.6-6-12 (2006)<br><br>Burns Ind. Code Ann. § 12-15-24-2 (2006) | Knowingly or Intentionally<br><br>None | No<br><br>No |
| IA | No statute found | N/A | N/A |
| KS | K.S.A. § 21-3847 (2006) | Knowingly and Intentionally | No |
| KY | KRS § 216.2950 (2006)<br><br>KRS § 205.8461 (2006) | Knowingly<br><br>Knowingly | Yes<br><br>Yes |
| LA | La. R.S. 14:70.5 (2006) | Intentional | Yes |

| STATE | KICKBACK STATUTE | MENS REA LANGUAGE | EMPLOYEE SAFE HARBOR |
|---|---|---|---|
| ME | No statute found | N/A | N/A |
| MD | Md. Criminal Law Code Ann. § 8-511 (2006) | None | No |
| MA | ALM GL ch. 118E, § 41 (2006) | None | Yes |
| MI | MCLS § 400.604 (2006) | None | No |
| MN | Minn. Stat. § 62J.23 (2005) (authorizes adoption of administrative rules that may be more restrictive than federal requirements) | N/A | N/A |
| MS | Miss. Code Ann. § 43-13-207 (2006) | None | No |

| STATE | KICKBACK STATUTE | MENS REA LANGUAGE | EMPLOYEE SAFE HARBOR |
|---|---|---|---|
| MO - | § 191.905 R.S.Mo. (2006) | Knowingly | No |
| | § 198.148 R.S.Mo. (2006) | Purposely | Yes in § 198.151 R.S.Mo. |
| | § 198.145 R.S.Mo. (2006) | Purposely | Yes in § 198.151 R.S.Mo. |
| MT | Mont. Code Anno., § 45-6-313 (2005). | Purposely or Knowingly | Yes - |
| NE | No statute found | N/A | N/A |
| NV | Nev. Rev. Stat. Ann. § 422.560 (2006) | None | No |
| NH | 12 RSA 167:61-a (2004) | Knowingly | No |

| STATE | KICKBACK STATUTE | MENS REA LANGUAGE | EMPLOYEE SAFE HARBOR |
|---|---|---|---|
| NJ | N.J. Stat. § 30:4D-17 (2006) | None | Yes |
| NM | N.M. Stat. Ann. § 30-41-2 (2006) | Knowingly | Yes in § 30-41-3 |
| | N.M. Stat. Ann. § 30-41-1 (2006) | Knowingly | Yes in § 30-41-3 |
| | N.M. Stat. Ann. § 30-44-7 (2006) | None | No |
| NY | NY CLS Soc Serv § 366-d (2006) | None | Yes |
| | NY CLS Soc Serv § 366-f (2006) | Intent to defraud– | Yes |

| STATE | KICKBACK STATUTE | MENS REA LANGUAGE | EMPLOYEE SAFE HARBOR |
|---|---|---|---|
| NC | No statute found | N/A | N/A |
| ND | No statute found | N/A | N/A |
| OH | ORC § 2913.40 (2006) | With purpose to commit fraud or Knowing that the person is facilitating a fraud | No |
| OK | 56 Okl. St. § 1005 (2005) | Willfully and Knowingly | Yes in Okl. St. § 1-742 |
| OR | No statute found | N/A | N/A |
| PA | 62 P.S. § 1407 (2005) | None | No |

| STATE | KICKBACK STATUTE | MENS REA LANGUAGE | EMPLOYEE SAFE HARBOR |
|---|---|---|---|
| RI | R.I. Gen. Laws § 5-48.1-3 (2006)<br><br>R.I. Gen. Laws § 40-8.2-3 (2006) | Knowingly and Willfully<br><br>Intentionally | Yes<br><br>Yes |
| SC | S.C. Code Ann. § 44-113-60 (2006) | None | No |
| SD | S.D. Codified Laws § 22-45-4 (2006) | None | No |
| TN | No statute found | N/A | N/A |
| TX | Tex. Hum. Res. Code § 32.039 (2006) | Knowingly See §32.0391 | Yes in § 32.029(x)(3) |
| UT | Utah Code Ann. § 26-20-4 (2005) | None | No |

| STATE | KICKBACK STATUTE | MENS REA LANGUAGE | EMPLOYEE SAFE HARBOR |
|---|---|---|---|
| VT | No statute found | N/A | N/A |
| VA | Va. Code Ann. § 32.1-315 (2006) | Knowingly and Willfully | Yes |
| WA | Rev. Code Wash. (ARCW) § 74.09.240 (2006) | None | Yes |
| WV | W. Va. Code § 9-7-5 (2006) | None | No |
| WI | Wis. Stat. § 49.49 (2006) | None | Yes |
| WY | No statute found | N/A | N/A |
| | | | |

(2)

No. 06-1333

FILED
MAY 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

STATE OF FLORIDA,

*Petitioner,*

*v.*

MARK K. SACHS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

## BRIEF IN OPPOSITION

ROBERTO D. STANZIALE
ROBERTO D. STANZIALE, P.A.
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Suite 407
Fort Lauderdale, Florida 33301
(954) 763-7909

*Attorney for Respondent*

208545

COUNSEL PRESS
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## QUESTION PRESENTED

Petitioner's version of the Question Presented is incorrect. It seeks to bootstrap an *additional* argument onto the Question presented in *Florida v. Harden*, No. 06-770, which the parties have consistently stipulated is controlling—and as to which this Court denied certiorari on April 23, 2007.[1] The Question Presented in *Harden* is actually:

> "Is The Florida Anti-Kickback Statute, § 409.920(2)(e), Florida Statutes (2000) Preempted by the Federal Anti-Kickback Statute 42 U.S.C., § 1320a-7b(b)(2) (2000), Since: (1) The Federal Statute Contains a 'Knowing and Willful' *Mens Rea* Requirement That is Not Part of The Florida Statute, and (2) The Federal Statute Contains 'Safe Harbor' Provision Not Present in The Florida Statutory Scheme?"

Onto the Question it has—at the State trial, intermediate appellate and Supreme Court levels—stipulated is controlling, Petitioner seeks to add the following argument:

> "1. Whether persons who receive remuneration for providing services or referrals for which

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1. As stated in the opinion for which the State now seeks review:

> "We have for review *State v. Sachs*, in which the Third District Court of Appeal affirmed the trial court's ruling *based upon the parties' stipulation at the trial level as to the controlling effect of State v. Harden*."

*State v. Harden*, 948 So.2 723, 724 (Fla. 2007) (emphasis added) (citations omitted). The Florida Supreme Court's opinion does not address the first issue Petitioner raises.

> payment is not made under Medicaid fall within the federal employee safe harbor provision."

*State's Petition* at 1.

As the above question was never adjudicated in the court below, this Court should not pass upon it for the first time today. The facts underlying such a question were never fully developed, argued or adjudicated in the courts below and it should not be entertained for the first time at this late date. The only Question Presented in this case is that stipulated to from its genesis and quoted at the top of this page.

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## ARGUMENT

### Proceedings Below

The Respondent, Mark K. Sachs, is a licensed physician. The State alleged that between May 1 and November 6, 1997, Dr. Sachs was paid for prescriptions he referred to be filled which were ultimately paid for by Medicaid.

Though Dr. Sachs' only conduct was receiving remuneration for referring patients, Petitioner filed criminal charges under § 409.920(2)(e), Florida Statutes, characterizing his actions as a "scheme." Dr. Sachs never admitted participating in a scheme, or that any scheme existed—much less a scheme to violate state or federal law.

Dr. Sachs filed a motion to dismiss in the trial court pursuant to Rule 3.190, Florida Rules of Criminal Procedure, which provides a procedural mechanism for a defendant to state constitutional grounds for dismissal and, based upon those constitutional grounds, to establish the absence of a *prima facie* case of guilt. Prior to Dr. Sachs' motion to dismiss, in an a unanimous decision, Florida's Third District Court of Appeal held a trial court correctly dismissed similar criminal charges, *State v. Harden,* 873 So.2d 352 (Fla. 3d DCA 2004), finding implied conflict preemption as Florida's Statute conflicted with federal law in two significant ways:

- 1. The federal statute contained several so-called "safe harbor" provisions that exclude certain types of payments from being considered "illegal remuneration". 42 U.S.C. § 1320(a)-7b(b)(3)(B) (2000). Specifically, 42 U.S.C. § 1320a-7b(b)(3)(B) (2000) protected employer/

employee payments for the provision of covered items or services from criminal prosecution. The Florida statute had no such "safe harbor" provisions.

2. The Federal Anti-Kickback Statute contained a "knowing and willful" *mens rea* requirement. Under the federal statute, "in order to establish a 'willful' violation of the statute, the government must prove that a defendant acted with knowledge that his conduct was unlawful", citing *Bryan v. United States,* 524 U.S. 184, 192 (1998). In contrast, the Florida statute only required that the defendant act "knowingly". By definition, the Florida statute included "mere negligent" conduct, an activity the federal statute intended to protect.

Thus, Florida's intermediate appellate court held F.S. 409.920(2)(e) unconstitutional as applied under the Supremacy Clause, Article VI, Clause 2 of the United States Constitution. The court also held a second aspect of Florida's Medicaid Fraud Statute, the *mens rea* requirement in F.S. § 409.920(1)(d), was preempted by federal law and unconstitutional on its face under the Supremacy Clause.

Following the Florida trial and appellate courts' unanimous holdings set forth in the opinion of Florida's Third District Court of Appeal in *State v. Harden,* 873 So.2d 352 (Fla. 3d DCA 2004), the trial court granted Dr. Sachs' motion to dismiss, finding the State's prosecution was preempted by both an express provision of the Federal Medicaid Act, 42 U.S.C. § 1320a-7b(b)(3)(B), and a parallel administrative "safe harbor" provision, 42 C.F.R. § 1001 952(i). The

criminal information against Dr. Sachs was dismissed and, as in *Harden*, Petitioner sought review in the state Supreme Court.

**Florida Supreme Court Decision in *Harden***

Florida's Supreme Court unanimously held the "anti-kickback" provision of Florida Statute 409.920(2)(e), conflicted with, and was thus preempted by, federal law. *State v. Harden,* 938 So.2d 480 (Fla. 2006). The court made a detailed analysis of the Federal Anti-Kickback Statute, comparing the federal statute with the Florida statutory scheme, and noting the two statutes collided in two important ways: (a) unlike the federal law, the Florida Statute had a lower *mens rea* requirement, allowing the State to charge a criminal anti-kickback violation based on behavior that was merely negligent, and (b) unlike the federal law, the Florida Statute lacked any "safe harbor" and criminalized payment for referrals. Florida's Supreme Court agreed with Florida's Third District Court of Appeal, holding § 409.920(2)(e), Florida Statutes, was preempted by federal law and thus unconstitutional under the Supremacy Clause.

As Florida's Supreme Court noted, the Florida Legislature amended the statute to conform to the federal *mens rea* standard. Ch. 2004-344, § 8 at 2392, Laws of Fla. The state statute now provides that the term "knowingly" also includes "willfully."

## REASONS FOR DENYING THE PETITION

The Florida Supreme Court correctly and unanimously held Florida's own Anti-Kickback Statute conflicted with and was preempted by the federal statute, that "compliance with both federal and state regulations is a physical impossibility," and that the state law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," citing this Court's plurality opinion in *Gade v. Nat'l. Solid Waste Management Ass'n.*, 505 U.S. 88, 89 (1992).

### Preemption Law Was Properly Applied

Congress has power under Article VI, cl. 2 of the United States Constitution to preempt state law. *Gibbons v. Ogden*, 9 Wheat 1, 211 (1824); *California v. Arc America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 161 (1989). States may not assert jurisdiction where Congress intended to preempt a field of law. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124 (1981).

To date, this Court has recognized at least three distinct species of preemption: (1) "express preemption," wherein a federal statute contains explicitly preemptive language; (2) "implied field preemption," where the federal regulatory scheme is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; and (3) "implied conflict preemption," where compliance with both federal and state regulations is physically impossible, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Gade v. Nat'l Solid Waste Management Ass'n.*, 505 U.S. at 98.

Thus, even where federal law does not occupy a particular field, a state law is preempted to the extent that it conflicts with federal law. *Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399 (1941). Implied conflict preemption exists when it is impossible for a private party to comply with both the state and the federal law. *See, Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372, 120 S. Ct. 2288 (2000); *English v. General Electric Co.,* 496 U.S. 72, 110 S.Ct. 2270 (1990).

Florida's highest court found conflicts between Florida's own statute, both on its face and as applied, and the federal statute to such an extent that conduct made legal by federal law was made illegal under state law.

**Facial Conflict - Differing *Mens Rea* Requirements**

Florida's Anti-Kickback Statute had a lower *mens rea* requirement than the federal statute. The state statute defined "knowingly" as an act "done by a person who is aware or *should be aware* of the nature of his of her conduct, and that his or her conduct is substantially certain to cause the intended result". § 490.920(1)(d), Florida Statute (Emphasis added). The federal statute, in contrast, applies only to those acts that are done "knowingly and willfully."

The term "willfully" itself denotes an act which is intentional, knowing, or voluntary—as opposed to accidental. *Felton v. United States,* 96 U.S. 699 (1877). In order to establish a "willful" violation of a criminal statute, "the government must prove that the defendant acted with knowledge that his conduct was unlawful." *Ratzlaf v. United States,* 510 U.S. 135, 137, 114 S.Ct. 659 (1994); *Bryan v. United States, supra.* Under federal law, a defendant must

not only know that a statute prohibits offering or paying remuneration for referrals—but also that he or she engaged in such referrals with the specific intent to violate the law. *See, Hanlester Network v. Shalala,* 51 F.3d 1390, 1400 (9th Cir. 1995); *United States v. McClatchey,* 217 F.3d 823 (10th Cir. 2000); *Cheek v. United States,* 498 U.S. 192, 198, 111 S.Ct. 604 (1991).

Petitioner's suggestion that the different *mens rea* standards in the two statutes is "inconsequential" since they criminalize the same intentional act of making referral payments (Petition at 9) ignores basic principles of criminal law. In order to violate the federal statute, one must not only intentionally make referrals, but must also make such referrals with knowledge that doing so would be a criminal violation. Under the Florida statute, in contrast, negligent conduct alone may give rise to a criminal conviction.

Congress intended to protect individuals such as Dr. Sachs by requiring proof that he not only "knowingly and willfully" violated the statute, but also "acted with an evil-meaning mind—*i.e,,* that he acted with knowledge that his conduct was unlawful." *United States v. Starks,* 157 F.3d 833, 838 (11th Cir. 1998). The state statute at bar provided no such protection—and criminalized conduct made legal under federal law.

Congress' stated purpose for amending the Anti-Kickback Statute by adding a "knowingly and willfully" *mens rea* element was its concern that criminal penalties could be imposed under the old law where "conduct, while improper, was inadvertent." *H.R. Rep.*, 96-1167 at 59 (1980), reprinted in 1980 U.S.C.C.A.N 5526, 5572.

**Safe Harbor Provisions**

Unlike its federal counterpart, the state statute contains no safe harbor. Congress authorized safe harbors, 42 C.F.R. §§ 1001.952(a)-(v), to protect relatively innocuous commercial arrangements that may technically violate federal law. The 23 safe harbors are intended to guide healthcare providers in knowing which business practices are legal. One safe harbor provides an illegal remuneration (or "kickback") "does not include any amount paid by an employer to an employee, who has a *bona fide* employment relationship with an employer." 42 C.F.R. § 1001.952(i).

Dr. Sachs is protected by a federal safe harbor. His status as *bona fide* employee remains unrefuted, and *Harden* found both that a similarly situated defendant fell within the employee safe harbor and that business solicitation by employees was legal.

In support of this construction, the Florida Supreme Court's studied opinion in *State v. Harden,* 938 So.2d 480 (Fla. 2006), cited numerous decrees of the Office of the Inspector General of the Department of Health and Human Services, Medicare, and state healthcare programs: *Fraud and Abuse, O.I.G. Anti-Kickback Provisions*, 56 Fed. Reg. 35, 952 and 35, 953 (July 19, 1991); *Medicare and Medicaid Programs; Fraud and Abuse, O.I.G. Anti-Kickback Provisions*, 54 Fed. Reg. 3088, 3093 (Jan. 23, 1989).

Petitioner attempts to pigeonhole the safe harbor provision in a manner contrary to its plain meaning. The safe harbor provision in 42 C.F.R., § 1001.952(i) protects employees for the "furnishing of any item for which payment may be made in whole or part under Medicare, Medicaid or

other federal healthcare programs." The state statute, in contrast, criminalizes receiving remuneration for referring an individual for the furnishing of "any item or service for which payment may be, in whole or in part, under the Medicare Program . . . or in obtaining, purchasing, leasing, ordering or arranging . . . any goods, facility, item, or service for which payment may be made, in whole or in part, under the Medicare Program." § 409.920(2)(e), F.S. The federal safe harbor and state statute cover the same conduct. The conduct at issue is therefore either covered by the federal safe harbor or not illegal under the state statute.

Petitioner has the burden of showing there may have been error below, *Higgins v. Carr Bros. Co.*, 63 S.Ct. 337 (1943), yet cites only three opinions of this Court for two propositions: (a) that "this Court has interpreted explicit statutory provisions recognizing state authority 'to mean what they say'" (*Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996)) (Petition at 8); and (b) that "a court 'should not extend its invalidation of a statute further than necessary to dispose of the case before it.'" (*Dalton v. Little Rock Fam. Planning Serv.*, 516 U.S. 474 (1996) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985)) (Petition at 9).

The decision below does not dispute whether 42 U.S.C. § 1396b(q)(3)'s definition of "State medicaid fraud control unit" *in a federal statute dealing uniquely with a State's qualification for federal Medicare assistance* "mean what they say,"[2] and Respondent does not ask the Court to extend

2. Moreover 42 U.S.C. § 1396b(q)(3) was not intended as a grant of authority for States to *legislate* in conflict with otherwise explicit Congressional intent, but merely requires fund-receiving (Cont'd)

invalidation of the statute further than necessary to dispose of this case. What the State criminal statute says and how it was found to have been applied in this case conflict with and are preempted by federal law. Invalidation need go no further than the decision below–making certiorari unnecessary.

**United States Supreme Court Decision**
**In State v. Harden**

Finally, as the parties have repeatedly stipulated that the decisions in State v. Harden are controlling in this matter and as, this Honorable Court refused to grant certiorari in that matter on April 23, 2007, under case number 06-770, the court should likewise deny certiorari in this matter.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be DENIED.

Respectfully submitted,

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(Cont'd)

States to have an entity in place "conducting a statewide program for the investigation and prosecution of violations of all *applicable* State laws." *Id.* (Emphasis added). State laws that conflict with and are thus preempted by federal law in violation of the Supremacy Clause are hardly "applicable."